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New Scrutiny of Judge's Most Controversial Case

By ADAM LIPTAK
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WASHINGTON — Near the end of a long and heated appeals court argument over whether New Haven was entitled to throw out a promotional exam because black firefighters had performed poorly on it, a lawyer for white firefighters challenging that decision made a point that bothered Judge Sonia Sotomayor.

"Firefighters die every week in this country," the lawyer, Karen Lee Torre said. Using the test, she said, could save lives.

"Counsel," Judge Sotomayor responded, "we're not suggesting that unqualified people be hired. The city's not suggesting that. All right?"

The exchange was unusually charged. Almost everything about the case of Ricci v. DeStefano — from the number and length of the briefs to the size of the appellate record to the exceptionally long oral argument — suggested that it would produce an important appeals court decision about how the government may use race in decisions concerning hiring and promotion.

But in the end the decision from Judge Sotomayor and two other judges was an unsigned summary order that contained a single paragraph of reasoning that simply affirmed a lower court's decision dismissing the race discrimination claim brought by Frank Ricci and 17 other white firefighters, one of them Hispanic, who had done well on the test.

The Ricci case, bristling with important issues, has emerged as the most controversial and puzzling of the thousands of rulings in which Judge Sotomayor participated, and it is likely to attract more questions at her Supreme Court confirmations hearings than any other.

The appeals court's cursory treatment suggested that the case was routine and unworthy of careful scrutiny. Yet the case turned out to be important enough

to warrant review by the Supreme Court, which heard arguments in April and is likely to issue a decision this month.

The result Judge Sotomayor endorsed, many legal scholars say, is perfectly defensible. The procedure the panel used, they say, is another matter.

There is evidence that the three judges in the case agreed to use a summary order rather than a full decision in an effort to find common ground. Allies of Judge Sotomayor, who was the junior judge on the panel of the United States Court of Appeals for the Second Circuit, correctly point out that the Second Circuit often decides even significant cases with summary orders that adopt the reasoning of the lower court. They add that the panel's decision reflected a respect for precedent, though it cited none. Judge Sotomayor certainly made no suggestion at the argument that she was constrained by precedent to rule for one party or the other.

At the argument, Judge Sotomayor did not indicate that she was inclined to use the case to make a larger statement about affirmative action. She was focused, instead, on the array of factual and legal issues before her.

"Race on some level was a part of this discussion" when New Haven's civil service board decided to throw out the test, Judge Sotomayor told Ms. Torre, the lawyer for the plaintiffs.

"The entire discussion before the board was, 'Was there an adverse impact on the minority candidates by this testing procedure?' " Judge Sotomayor said.

That sort of race consciousness, she said, may be perfectly lawful. "You can't have a racially neutral policy that adversely affects minorities," Judge Sotomayor said, "unless there is a business necessity."

Her extensive and probing questions at the argument were typical of her methodical approach to cases, and they offer sometimes conflicting hints about her views on when the government may take account of race in decisions concerning hiring and promotion.

At times, her questions were small lectures on the governing legal standards.

"You have to look at the test and determine whether the test was in fact fair or not," Judge Sotomayor told a lawyer for the defendants, Richard A. Roberts. "If you're going to say it's unfair, point to specifics, of ways it wasn't, and make sure that there really are alternatives."

But the summary order Judge Sotomayor joined drew none of those distinctions.

Catherine O'Hagan Wolfe, the clerk of the court, said in an e-mail message that such an order "ordinarily issues when the determination of the case revolves around well-settled principles of law."

The Ricci case does not meet that standard, Judge Jose A. Cabranes wrote for himself and five other judges in a dissent from the full court's decision not to rehear the case. The questions posed in the Ricci case, Judge Cabranes wrote, were exceptionally important "constitutional and statutory claims of first impression" — meaning ones where no binding precedent exists.

The district court judge in New Haven, whose opinion the appeals court panel affirmed and adopted, did identify three earlier Second Circuit decisions concerning the use of race by the government in hiring and promotional exams. But they did not involve precisely the same issues.

The panel's brief decision in the Ricci case was conversational in tone, and it does not reflect Judge Sotomayor's somewhat bureaucratic writing style.

It did strike a note of empathy, though one couched in a double negative: "We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated."

The decision ruled that New Haven's civil service board "had no good alternatives" and was protected because it "was simply trying to fulfill its obligations" under a federal civil rights law when it was "confronted with test results that had a disproportionate racial impact."

In the Second Circuit, Judge Sotomayor was the junior judge on the panel, which also included Judge Rosemary S. Pooler, who was the presiding judge at the argument, and Judge Robert D. Sack, who did not attend due to illness.

In the end, according to court personnel familiar with some of the internal discussions of the case, the three judges had difficulty finding consensus, with Judge Sack the most reluctant to join a decision affirming the district court. Judge Pooler, as the presiding judge, took the leading role in fashioning the compromise. The use of a summary order, which ordinarily cannot be cited as precedent, was part of that compromise.

Neil A. Lewis contributed reporting.